BLANK PAGE

No. 516.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

O. G. RICHTER, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

RICHARD H. WILMER,
DOUGLAS L. HATCH,
Attorneys for Respondent.

November 7, 1940.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

BLANK PAGE

INDEX

	Page
Opinion Below	1
Statement of the Case	2
Questions Presented	3
Statutes and Regulations Involved	3
Reasons Why the Writ Should Not Be Granted	3
Argument	4
Point I. A writ of certiorari should not be granted to review an issue not considered by, and not properly raised before, the Board	4
Point II. Under the limited facts presented to the Board, there is no liability under Section 22(a) of the Revenue Act of 1934	6
Point III. There exists no genuine conflict of decisions	7
Conclusion	8

STATUTES AND REGULATIONS CITED

Section 22(a), Revenue Act of 1934.....2, 3, 4, 5, 6, 7, 8
Section 166, Revenue Act of 1934.....2, 3, 4, 5, 8
Article 166-1, Regulations 86.....2, 3, 4

TABLE OF CASES CITED

Burnet v. *Commonwealth Improvement Co.*, 287 U. S. 415 4
General Utilities & Operating Co. v. *Helvering*, 296 U. S. 200 ..... 4, 6
Helvering v. *Achelis*, 112 F. (2d) 929 (C. C. A. 2d, 1940) 8
Helvering v. *Clifford*, 309 U. S. 331, 60 S. Ct. 554....4, 6, 7
Helvering v. *Hormel*, 111 F. (2d) 1 (C. C. A. 8th, 1940) 7, 8
Helvering v. *Minnesota Tea Co.*, 296 U. S. 378..... 4
Helvering v. *Salvage*, 297 U. S. 106 4
Helvering v. *Tex-Penn Oil Co.*, 300 U. S. 481 ..... 4, 6
Helvering v. *Wood*, 309 U. S. 344, 60 S. Ct. 551.....2, 4, 5
Kottemann v. *Commissioner*, 81 F. (2d) 621 (C. C. A. 2d, 1936) 8
Rhodes v. *Commissioner*, 111 F. (2d) 53 (C. C. A. 4th, 1940) 8

BLANK PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 516.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

O. G. RICHTER, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINION BELOW.

The opinion below of the United States Circuit Court of Appeals for the Third Circuit (R. 28-30) is reported in 114 F. (2d) 452. That court unanimously affirmed a decision of the United States Board of Tax Appeals (R. 17-18) which determined that there was no deficiency in income tax for the taxable year 1934. The Memorandum Opinion of the Board (R. 16-17) is not officially reported.

STATEMENT OF THE CASE.

The summarization of the facts contained in the petition substantially states all of the essential facts. There is one additional fact which was not presented, namely, that the beneficiary reported the income from the trust in her income tax return for the year 1934 (R. 10).

It is to be noted at the outset that before the Board the Commissioner based the alleged tax liability of the respondent exclusively upon the issue of the application of Section 166 of the Revenue Act of 1934. From the decision of the Board the Commissioner appealed to the court below. In assigning error (R. 20) in the decision of the Board, the Commissioner specifically assigned as error the determination of non-taxability under the provisions of Section 166 of the Revenue Act of 1934; not having yet raised the issue of taxability under Section 22(a) of the Revenue Act of 1934, he did not assign as error the failure of the Board to hold that the trust income was taxable to the settlor under the provisions of Section 22(a) of the Revenue Act of 1934. After the decision of this Court in the case of *Helvering* v. *Wood,* 309 U. S. 344, the preparation of the record by stipulation having been held in abeyance pending such decision, the Commissioner for the first time by his Statement of Points To Be Relied Upon (R. 22) sought to raise the issue of taxability under the provisions of Section 22(a) of the Revenue Act of 1934, and before the court below specifically abandoned the issue of taxability under Section 166.

In his petition for writ of certiorari, the Commissioner for the first time seeks to contend that the issue of taxability under Section 22(a) of the Revenue Act of 1934 was properly presented for determination by virtue of the reference by the Commissioner in Point III of his brief before the Board to the provisions of Article 166-1 of Regulations 86. Point III of such brief in no wise raised the issue of taxability under Section 22(a) and in fact the provisions of the Regulations were merely urged as an additional reason in support of taxability under Section 166 of the Revenue Act of 1934. After quoting from Article 166-1 of Regula-

tions 86, the Commissioner concluded Point III of his brief as follows:

> "Respondent contends that the regulations are reasonable *and fairly represent the intended application of the provisions of Section 166 of the Revenue Act of 1934* and that the application of the regulations to the facts of the instant case clearly requires that the Commissioner's determination of deficiency for the year 1934 should be sustained." (Italics ours.)

The case before the Board having been tried on the single issue of taxability under provisions of Section 166, and the Commissioner having abandoned such issue of taxability in the court below, that court merely held that it would not pass upon the new issue sought to be presented on appeal for the first time and affirmed the decision of the Board.

QUESTIONS PRESENTED.

The only question raised by the petition for writ of certiorari is whether the Circuit Court of Appeals erred in refusing to review the decision of the Board of Tax Appeals on the basis of an issue raised for the first time in that court, the sole issue, upon which the case had been originally tried and submitted before the Board, having been abandoned by the Commissioner.

STATUTES AND REGULATIONS INVOLVED.

The issue of tax liability under Section 166 of the Revenue Act of 1934, having been abandoned by the Commissioner, that Section of the Revenue Act is no longer directly involved. The Commissioner, we believe, erroneously seeks to make applicable the provisions of Section 22(a) of the Revenue Act of 1934, and the provisions of 166-1 of Treasury Regulations 166, as amended.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

The petition presents no genuine conflict of decisions, nor does it present an important question of general law.

ARGUMENT.

POINT I.

A Writ of Certiorari Should not be Granted to Review an Issue not Considered by, and not Properly Raised Before, the Board.

The issue of taxability under the provisions of Section 166 of the Revenue Act of 1934 having been abandoned by the Commissioner, the sole point remaining for decision by the court below was whether the Commissioner might, on appeal, successfully assert tax liability on a new issue presented for the first time in that court.

This Court has repeatedly refused to permit an issue, not framed and tried before the Board, to serve on appeal as a basis for predicating tax liability. See *Helvering* v. *Wood,* 309 U. S. 344, 60 S. Ct. 551, 553; *Helvering* v. *Tex-Penn Oil Co.,* 300 U. S. 481, 498; *Helvering* v. *Salvage,* 297 U. S. 106, 109; *General Utilities & Operating Co.* v. *Helvering,* 296 U. S. 200, 206; *Helvering* v. *Minnesota Tea Co.,* 296 U. S. 378, 380; *Burnet* v. *Commonwealth Improvement Co.,* 287 U. S. 415, 418.

The Commissioner, apparently recognizing the soundness of this line of authorities, now seeks in his petition herein to bring this case outside the purview of such authorities by asserting that the issue of taxability under Section 22(a) of the Revenue Act of 1934 was actually presented to the Board by virtue of the fact that before the Board the Commissioner relied upon Article 166-1 of Regulations 86. That such Regulations were promulgated under the provisions of Section 166 of the Revenue Act of 1934, is clear. The amended provisions of such Regulations were not put into effect until after the tax year in question. Furthermore, the issue of tax liability cannot be predicated on a mere Regulation, but must find basis in the Revenue Act itself. In *Helvering* v. *Wood, supra,* the Commissioner was not permitted, through the assertion of Article 166-1, to shift to Section 22(a) a case which had been tried under Section 166. In that case and in *Helvering* v. *Clifford,* 309 U. S. 331, this Court considered that Article 166-1 was not

an appropriate regulation on which tax liability under Section 22(a) might be asserted for the year 1934, which is the only year involved in the instant case. The issue presented and tried before the Board in the instant case was one solely of taxability under Section 166, and the issue of taxability under the provisions of Section 22(a) was not asserted by the Commissioner until after the decision of this Court in the case of *Helvering* v. *Wood, supra.* In that decision the Commissioner acquiesced by abandoning in the instant case the issue of taxability under Secton 166.

In the original deficiency letter (R. 7) the Commissioner fixed the issue of tax liability when he determined:

> "The record indicates that under the provisions of Section 166 of the Revenue Act of 1934 the trust created by you in 1930 for the benefit of your wife, Nanny C. Richter, was a revocable trust and, therefore, the net income is taxable to the grantor."

The issue so stated was the only issue upon which the parties tried the case before the Board. The Board so held, for in its decision it stated that the issue

> "for decision is whether the trust income is taxable to the petitioner under Section 166 of the Revenue Act of 1934." (R. 16)

The simple question now involved, therefore, is whether the taxpayer is to be subjected to the "possibility of prejudice" which to the court below appeared [redacted] "to be self evident."

As was noted by the court below in the instant case, the stipulation of facts and the preparation of the entire case were predicated upon the issue of tax liability under Section 166. The court, in considering the new issue of tax liability under Section 22(a) and the effect of passing upon such new issue on appeal for the first time, said, 114 F. (2d) 452, 453 (R. 29):

> "The issue presented to the Board was whether section 166 applied to a trust in which the estate reverted to the settlor after a period of years. The stipulated facts were framed with this issue in view. Under sec-

tion 22(a) the issue presented is whether the grantor after the establishment of the trust may still be treated as the owner of the corpus. This involves in addition to an analysis of the terms of the trust consideration of all of the circumstances attendant on its creation and operation. Helvering v. Clifford, supra. Obviously many facts which would be totally irrelevant to the issue which was presented to the Board might be pertinent and even determinative of the issue now sought to be raised for the first time in this court. The possibility of prejudice to the taxpayer appears to us to be self evident."

To the same effect is a statement by this Court, *General Utilities & Operating Co.* v. *Helvering, supra,* at page 206:

> "Always a taxpayer is entitled to know with fair certainty the basis of the claim against him. Stipulations concerning facts and any other evidence properly are accommodated to issues adequately raised."

See also the similar statement in *Helvering* v. *Tex-Penn Oil Co., supra,* at page 498.

POINT II.

Under the Limited Facts Presented to the Board, There is no Liability Under Section 22(a) of the Revenue Act of 1934.

Even on the basis of the facts as stipulated before the Board, limited as they were to the one narrow issue then present before the Board, the income from the trust involved here could not have been held to be properly taxable to the settlor, even if the issue of Section 22(a) had been raised in a proper fashion before the Board. The facts in the instant case are substantially different from those in the *Clifford* case. The Court in that case did not hold that under Section 22(a) the income from all short-term trusts made by husbands for the benefit of wives was taxable to the husbands. If Congress had intended such a result, it could easily have said so, but that it has never done. Without stating all the points of factual difference between the instant case and the *Clifford* case, it should be noted that in

the instant case The Union Trust Company of Pittsburgh was the trustee, not the settlor. Such trustee had power (a) to hold and invest the trust securities; (b) to convert and sell them and to reinvest the proceeds of such investments as it should deem safe and profitable; (c) to collect and receive interest, income, dividends and profits; and (d) to pay the expenses of the management of the trust fund and to pay the balance of said interest, income and profits to the beneficiary. In the *Clifford* case, this Court was careful to point out that each case under Section 22(a) rests on its own particular facts. Thus, on such limited facts that were stipulated in the instant case, it seems clear that the income from the trust would not have been taxable under Section 22(a), even if the issue had been properly raised when the case was before the Board.

POINT III.

There Exists no Genuine Conflict of Decisions.

The Court should not grant the petition for writ of certiorari on the basis of the alleged conflict between the decision in this case and the decision in *Helvering* v. *Hormel*, 111 F. (2d) 1. A decision by this Court of the *Hormel* case, in which the petition for writ of certiorari has already been granted, will set at rest any conflict that might exist between that case and the decisions of this Court above referred to holding that a new issue of tax liability cannot be asserted on appeal. The Circuit Court of Appeals in its decision in the *Hormel* case specifically held that in that "case there is no dispute about the facts;" indicating that the basic facts necessary for a determination of the new issue were before the court. All the facts on a Section 22(a) issue are not before this Court in the instant case, as the court below so found, and that is a fundamental distinction. The Circuit Court of Appeals in the *Hormel* case stated that its right to reverse the Board on the newly-raised issue of tax liability under Section 22(a) "is not free from doubt." The final resolution of this doubt by this Court is in no wise dependent upon the granting of certiorari in the instant case.

The existence of conflict between decisions of two or more circuit courts of appeals generally forms a basis for the granting of petitions for writs of certiorari by this Court. However, the present situation does not appear to us to come within this general rule, for the reason that the decision of the court below in the instant case follows a long line of authorities of this Court and Circuit Courts of Appeals,[1] and the only decision that may be considered contrary to this established line of decisions is the *Hormel* case itself, a separate decision standing all alone in which the court that rendered it admitted its action was "not free from doubt." From what has just been stated, it is submitted that there is not involved in this case an important question of general law, as that expression is generally understood.

CONCLUSION.

The decision below was right. The law is settled, and the decision could not have been otherwise, without disregarding a long line of decisions of this Court. In addition, there is nothing in the record on which the court below might have found respondent liable under Section 22(a), had it erroneously considered that issue.

The petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD H. WILMER,
DOUGLAS L. HATCH,
Attorneys for Respondent.

November 7, 1940.

---

[1] *Rhodes* v. *Commissioner*, 111 F. (2d) 53 (C. C. A. 4th, 1940); *Kottemann* v. *Commissioner*, 81 F. (2d) 621 (C. C. A. 2d, 1936). See also *Helvering* v. *Achelis*, 112 F. (2d) 929 (C. C. A. 2d, 1940), in which the United States Circuit Court of Appeals for the Second Circuit on an appeal from a decision of the Board of Tax Appeals, holding the taxpayer nontaxable on the sole issue of taxability under Section 166, declined to consider the taxpayer's liability under the issue of the applicability of Section 22(a) raised for the first time in that court. No review of that decision has been sought in this Court and the time therefor has now expired.

BLANK PAGE